

IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA

KALYNE W. ULMER,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI02-13

JUDGMENT ON APPEAL

DATE OF HEARING: October 21, 2002, in chambers at District Courtroom,
Holt County Courthouse, O'Neill, Nebraska.

DATE OF RENDITION: October 23, 2002.

DATE OF ENTRY: Court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer without plaintiff-appellant.

For defendant-appellee: Carl Schuman, Boyd County Attorney, on behalf of
Nebraska Attorney General.

SUBJECT OF JUDGMENT: Decision on the merits on petition for review under
Administrative Procedure Act.

FINDINGS: The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. As the Nebraska Court of Appeals has restated, proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721, 619 N.W.2d 78 (2000). However, where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and

accepted one version of the facts rather than another. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Chrysler Corp. v. Lee Janssen Motor Co.*, *supra*.

2. The court has considered all of the claims asserted in the petition for review. However, the court does not discuss in detail those issues clearly lacking any legal merit. The matters asserted in paragraphs 5, 11, and 12 of the petition for review are identical to those considered in *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8th Dist., 2001), which decided those issues adversely to the appellant's contentions. The explanations set forth in *Gillespie* need not be repeated here.

3. The principal arguments advanced by the appellant for reversal appear in paragraphs 13A and 13B regarding admission into evidence of the sworn report. The appellant objected on three grounds: hearsay, lack of foundation, and differing content from the copy claimed to have been served on appellant.

4. The hearsay objection lacks merit. *Vergil v. Department of Motor Vehicles*, 11 Neb. App. ____ (case No. A-01-474, Oct. 22, 2002).

5. The examination of the arresting officer satisfied the foundational requirements for the sworn report derived from the *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), and *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). That sworn report was received as Exhibit 4-1.

6. Appellant's counsel offered and the hearing officer received over the appellee's objection an Exhibit 6. Although the appellant's counsel asserted that Exhibit 6 was the copy served on the appellant, there was no testimony to that effect. Indeed, there was no sufficient foundation for Exhibit 6. Although the hearing officer erred in receiving Exhibit 6, the appellant invited that error.

7. The purported variance between Exhibit 4-1 and Exhibit 6 is the placement at the end of the line reading "is not valid as a temporary license because:" of the initials

“sw”. There was no testimony whatsoever that Exhibit 4-1 did not accurately show the content of the sworn report. The arresting officer persuasively testified that he did not place the “sw” on the original sworn report to the department.

8. Technically, the “temporary license” portion of the form is probably not part of the sworn report. The temporary license is separate and distinctly legally from the sworn report, even though the department has elected to place them both on the same page of the same form. Thus, the claimed variance is probably not even part of the sworn report.

9. But even disregarding that hurdle, and even if the initials “sw” were somehow placed on the appellant’s copy, that would fail to prove that the sworn report was not forwarded by the arresting officer to the department or that the sworn report did not contain all of the statutory and regulatory recitals. The “sw” would constitute, at most, mere surplusage having no substantive effect upon the content of the sworn report. The objection and the appellant’s argument call to mind the title of Shakespeare’s play *Much Ado About Nothing*.

10. Upon de novo review, the court finds by the greater weight of the evidence:

a. The arresting officer had probable cause to believe that the appellant was operating or in actual physical control of a motor vehicle in violation of § 60-6,196; and,

b. The appellant was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1).

11. The decision of the director should be affirmed.

JUDGMENT:

IT IS THEREFORE ADJUDGED that:


1. The order of revocation rendered on July 22, 2002, is affirmed.


2. The suspension of such revocation on appeal under NEB. REV. STAT. § 60-6,208 (Reissue 1998) is dissolved, and the full period of revocation shall run from the date this judgment becomes final.


3. Costs on appeal are taxed to the plaintiff-appellant. Any request for attorneys' fees, express or implied, is denied.

Signed in chambers at **Ainsworth**, Nebraska, on **October 23, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

BY THE COURT:

 Mail a copy of this order to all counsel of record and any pro se parties, **including to both the Boyd County Attorney and the Nebraska Attorney General for defendant.**
Done on _____, 20____ by _____.

 Note the decision on the trial docket as: [date of filing] **Signed "Judgment on Appeal" entered.**
Done on _____, 20____ by _____.

 Mail postcard/notice required by § 25-1301.01 within 3 days. (Order of revocation affirmed; stay dissolved; costs taxed to plaintiff-appellant)
Done on _____, 20____ by _____.

William B. Cassel, District Judge

Mailed to: